**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE J.B.KOSHY**
**&**
**THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR**

**MONDAY, THE 5TH FEBRUARY 2007 / 16TH MAGHA 1928**

**WP(C).No. 8743 of 2005(N)**
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**OS.764/1992 of ADDL.MUNSIFF COURT, PALAKKAD**
**.....**

**PETITIONERS:**
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1. **T.M. MUHAMMED SAHIB, S/O.T.K. MOHAMMED ALI, RESIDING AT THOTTINGAL HOUSE, 25/549, MANJAKULAM, PALAKKAD.**

2. **M.A. KAMARUDHEEN, S/O. ABBAS, RESIDING AT ABBAS MANZIL, MANJAKULAM, PALAKKAD.**

**BY ADV. SRI.K.RAMAKUMAR**
**SRI.T.RAMPRASAD UNNI**

**RESPONDENT:**
**----------**

**ARAKKAL MOHAMMED IBRAHIM, S/O. ARAKKAL ABDUL RAHIMAN, MUSALIYAR, MUTHAVALLI, MANJAKULAM PALLI JARAM, PALAKKAD.**

**BY ADV. SRI.T.KRISHNAN UNNI**
**SRI.P.A.ABDUL JABBAR, SC, WAKF BOARD**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/02/2007 ALONG WITH WPC NO. 20780 OF 2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**WPC.NO.8743/2005 N**

**APPENDIX**

**PETITIONER'S EXHIBIT:**

**EXT.P1:** **COPY OF ORDER IN I.A.NO.2217 OF 2002 & 2218/2002 IN O.S.NO. 764 OF 1992 DTD. 1/03/2005 ON THE FILE OF THE MUNSIFF'S COURT, PALAKKAD.**

**/TRUE COPY/**

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**J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.**

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W.P.(C)Nos.8743 & 20780 OF 2005

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Dated 5th February, 2007

**JUDGMENT**

**Koshy,J.**

Whether a civil court has jurisdiction to continue to adjudicate a pending suit after introduction of Section 85 of the Wakf Act, 1995 is the question referred by a learned Single Judge of this court to the Division Bench.

2. Before dealing with the question of law referred, we may refer to the facts of these cases. A predecessor of the petitioner in W.P.(C)No.20780 of 2005 filed a civil suit (O.S.No.764 of 1992) before the Munsiff's Court, Palakkad. Some interim orders were also passed by that court. When Section 85 of the Wakf Act was introduced with effect from 1.1.1996, the suit was returned by the civil court. The petitioner challenged the same which resulted in Ext.P1 judgment (reported as **Abdul Rahiman Musaliar** v. **Muhammed Sahib** (2002(3) KLT 742). The S.L.P filed against the above decision was also dismissed by the Hon'ble Apex Court as can be seen from Ext.P6 in W.P.(C)No.20780 of 2005. The Learned Single Judge held that civil court has no jurisdiction only in matters wherein the Wakf Tribunal was given specific powers to adjudicate, but, other matters can continue to be agitated in

the civil court. It was also held that only if the entire subject matter of the suit pertains to matters squarely coming within the jurisdiction of the Tribunal, civil court shall cease to have jurisdiction to adjudicate such proceedings. Hence following direction was given:

> "There is no finding here as to whether there are any other issues which are specifically required to be decided by the Tribunal under the Act. The suit as a whole cannot be said to be one falling outside the jurisdiction of the civil court, for the reasons already mentioned above, hence it would be proper for the court below to consider various issues arising in the case and if it finds later that any such issues required to be decided by the Tribunal under the Act, then it will be open to the court below to take recourse to the option pointed out by the Apex Court as aforesaid for referring that particular issue to the Tribunal and after such decision is received to decide the case fully. Hence, it is for the court below to frame issues and advert to each of them and see whether any particular issue is required to be decided by the Tribunal and if so, to refer the same alone for the decision of the Tribunal."

Thereafter, court directed the civil court to proceed with

the suit in accordance with law. Interim directions issued were allowed to continue. Accordingly, suit was proceeded by the civil court, but, meanwhile, the original plaintiff died and the petitioner who is the eldest son filed an impleading petition and the above impleading petition and amendment application were allowed by Ext.P1 (produced in W.P.(C)No.8743 of 2005). The objection that civil court has no jurisdiction to decide the same was not accepted because of Ext.P1 inter parte decision in **Abdul Rahiman Musaliar** v. **Muhammed Sahib** (2002(3) K.L.T. 742). It is the contention of the petitioners in W.P.(C)No.8743 of 2005 that the above order was passed without jurisdiction as decision of the learned Single Judge in ***Abdul Rahiman's*** case (supra) is overruled by a Division Bench of this court in a subsequent decision in another case (**Pookoya Haji** v. **Cheriyakoya** (2003(3) K.L.T 32)). The Division Bench held that wordings of Section 85 of the Wakf Act are very wide so as to cover entire disputes concerning Wakf and Tribunal has jurisdiction to decide the matters relating to any Wakf or Wakf property and, therefore, Section 85 completely debars civil court jurisdiction with regard to disputes regarding the Wakf or Wakf property. Even though Ext.P1 is an inter parte judgment, as it was overruled by this court and the present accepted position of law is that suits

regarding matters connected with Wakf and Wakf property can be filed only before the Tribunal and not before the civil court, we are of the view that petitioners in W.P.(C) No.8743 of 2005 were justified in raising the question of jurisdiction again. In **Mathura Prasad** v. **Dossibai** (AIR 1971 SC 2355), the apex court held that question relating to jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of that court and such decision cannot operate as res judicata in subsequent proceedings and question of jurisdiction can be taken even at the execution stage. In the above circumstances, though Ext.P1 is inter parte decision, since that decision was overruled, the defendants can take jurisdictional aspect again and, therefore, we are considering that question whether suit is maintainable or not. The Division Bench in ***Pookoya Haji's*** case (supra) only considered the question regarding maintainability of the suits filed after introduction of Section 85 of the Wakf Act. With respect to pending suits, the plaintiff also did not challenge the passing observation in Ext.P1 judgment, produced in W.P.(C)No.20780 of 2005, that if Section 85 of the Wakf Act is applicable, it is applicable to pending suits also as the above judgment was totally in his favour. Therefore, the whole question to be considered is whether pending suits are barred in view of Section 85

of the Wakf Act.

3. Section 85 of the Wakf Act is reproduced below:

> "**85.Bar of jurisdiction of civil courts:-** No suit or other proceeding shall lie in any civil court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal."

It is the contention of the plaintiff that even though the wordings used are `no suit shall lie', ordinarily, it would mean that no fresh suit shall be filed or action can be instituted whereas according to the defendants, it would mean that no suit shall be entertained and no legal proceedings shall be continued. In **R.Rajagopal Reddy** v. **Padmini Chandrasekharan** ((1995) 2 SCC 630) the Apex Court was considering the question of bar of suits under Section 4 of the Benami Transactions (Prohibition) Act, 1988. The court held that the wordings `no suit shall lie' and `no defence based on rights in respect of property shall be allowed' in Section 4 of that Act will not affect the pending suits. It was further argued that mere providing of a statutory Tribunal, instead of a civil court, is only procedural, but, right to file suit is substantial and,

therefore, the suits filed before the establishment of the Tribunal will not lapse. There is no provision in the Act for saving the existing pending suits. Wherever there is exclusion of jurisdiction including pending suits, Legislature has made provisions also. Section 8(1) of the Family Courts Act provides for exclusion of jurisdiction of District Court and Subordinate civil court on establishment of Family Court, but, Section 8(c)(i) provides that proceedings which are pending before the establishment of Family Court before District Court or subordinate court shall stand transferred to such Family Court on the date on which it is established. Relevant provisions are as follows:

> "Where a Family Court has been established for an area, (a) No District Court or any Subordinate civil court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the explanation to that sub-section relating to family matters."
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> "Proceeding which is pending immediately before the establishment of such Family Court before any district court or subordinate court, shall stand transferred to such Family Court on the date on which it is established."

Similarly, when Debt Recovery Tribunal was constituted,

there was a provision for transfer of pending cases to the Tribunal. Section 31 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides as follows:

> "Every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal."

Similar was the case when Administrative Tribunal was constituted. There was a specific provision to transfer cases pending before various courts to the Administrative Tribunal. Section 28 of the Administrative Tribunals Act, 1985 provides as follows:

> "On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any service or post, no court except -
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> (a) the Supreme Court; or
> (b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 914 of 1947) or any other corresponding law for the time being in force,

> shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

Section 29(1) provides as follows:

> "Every suit or other proceeding pending before any court or other authority immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal."

There was no provision in the Wakf Act contemplating transfer of the pending suits to the Tribunal as on the date of establishment of the Tribunal.

4. Another decision cited was the decision of the Supreme Court in **K.Eapen Chako** v. **The Provident Investment Company (P) Ltd.** (AIR 1976 S.C. 2610) wherein the Supreme Court considered the question whether because of the exclusion of jurisdiction of civil court under Section 125 (1) and (3) of the Kerala Land Reforms Act, pending suits are saved. A Full Bench of this court in **Anantha Narayana**

**Iyer** v. **Pran** (1976 K.L.T. 403 (FB)) held that there was express provision saving pending suits under proviso to section 125(3). Such a proviso was not incorporated in section 125(1) and, therefore, pending suits covered under section 125 (1) are not saved and such suits are also barred. Overruling the above Full Bench decision, the Apex Court held that pending suits can be continued by the civil court. A Division Bench of this court in **Rajalakshmi Associates** v. **Sree Meenakshi Papers** (2003 (2) KLT 225) held that no further appeal is maintainable under section 5(2) of the Kerala High Court Act against the judgment of the learned Single Judge in view of Section 100A of the Code of Civil Procedure (Amendment Act, 22 of 2002). The words used in Section 100A are as follows:

> "No further appeal shall lie from the judgment and decree of such Single Judge."

The Division Bench held that no appeal shall lie after the introduction of the above Act even though judgment of the learned Single Judge was passed prior to the date of amendment. But, at the same time, the appeals already filed before the amendment was introduced are maintainable. The same view was taken by the Full Bench of Madhya Pradesh High Court in **Laxminarayan** v. **Shivlal Gujar** ((2003)

1 ILD 64 (MP)(FB)). The Supreme Court in **Bento De Souza Egipsy** v. **Yvette Alvares Colaco and others** ((2004) 13 SCC 438) held that appeals already filed, admitted and pending can be continued. The same reasoning can be adopted here.

5. Learned counsel for the defendants relied on the decision of a Division Bench of this Court in **Vasu** v. **Pathooty Umma** (1990 (1) KLT 670) wherein it was held that subordinate judge cannot hear and dispose of an appeal filed before him under the Rent Control Act in view of the amendment of the Act making the District Court as the first appellate authority. The same view was taken by another Division Bench also in **Shahul Hameed & Ors.** v. **S.Gangadhara Warrier** (1996(1) K.L.T. 255). In that case, none of the substantive right was affected and only appeal forum was changed and also there was provision to transfer pending appeals from sub court to District court. It is true that in the Rent Control Act, after the introduction of Section 11, even if decree was passed, eviction cannot be enforced. Interpreting the above provision, a Full Bench of this Court in **Kuruvilla Abraham** v. **John** (1995(1) KLT 161 (F.B.)) held that civil courts cannot have any jurisdiction to deal

with the dispute, if any decree passed is not enforceable and the appeal filed against such decree also is not maintainable in view of the wordings of Section 11(1) of the Kerala Buildings (Lease and Rent Control) Act, 1965. Section 11 (1) reads as follows:

> "**11. Eviction of tenants:-**
>
> (1) Notwithstanding anything to the contrary contained in any other law or contract a tenant shall not be evicted, whether in execution of a decree or otherwise, except in accordance with the provisions of this Act:.."

The wordings in this case are entirely different. It is well settled law that civil court's jurisdiction can be barred by statute and if jurisdiction is barred either expressly or impliedly, civil court will have no jurisdiction to deal with the case. In **Premier Automobiles** v. **K.S.Wadke** (AIR 1975 S.C 2238), the Apex Court held that in view of the provisions in the Industrial Disputes Act read with Section 9 of the Civil Procedure Code, matters covered by the Industrial Disputes Act cannot be decided by the civil court. Same view was taken by the Apex Court in **State of Mizoram** v. **Biakchhawna** ((1995) 1 SCC 156) wherein it is held that after introduction of Section 18 of the Land Acquisition Act, 1894, civil court has no jurisdiction

regarding enhancement of compensation awarded and parties have to go through the procedure of reference made by Collector as provided under section 18. Here, there is neither express or implied bar in continuing the pending suit in the civil court.

6. Rajasthan High Court in **Syed Inamul Haq shah** v. **State of Rajasthan** (AIR 2001 RAJASTHAN 19) held that `no suit or other legal proceedings shall lie' would mean no suit or legal proceedings shall be carried on or continued to be entertained and if so, bar of jurisdiction would thus apply to pending proceedings also. We are of the opinion that such a view was possible if there was provision for transfer of the pending suits to the Tribunal. Then, there is only change in forum. Here, pending actions are not protected to be transferred to new forum or express provision for barring pending civil suit. A retrospective statute which affects rights in existence is not readily construed to affect adjudication of pending proceedings as held in **United Provinces** v. **Mt. Atiqa Begum** (AIR 1941 FC 16). See also **K.S.Paripoornan** v. **State of Kerala** (AIR 1995 SC 1012). Right to sue is a substantial and valid right. In the absence of a provision to transfer the pending suits to Tribunal, remedy of the plaintiffs cannot be taken away without express provision in the statute. If parties are

left with no remedy for enforcement of rights which are subject matter in pending suits, the substantive right will be affected. In this context, Section 9 of the Code of Civil Procedure is also relevant. As held by the Apex Court in **M.V.Elisabesh** v. **Harwan Investment & Trading Pvt. Ltd., Goa** (AIR 1993 SC 1014) court shall not as far as possible take an interpretation which will non suit a person.

7. In Principles of Statutory Interpretation by Justice G.P. Singh (Ninth Edition (2004) Page No.438), after quoting various decisions of the courts, it is stated as follows:

> "It is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation."

In **Smithies v. National Association of Operative Plasterers** ((1909) 1 KB 310) section 4 of the Trade Disputes Act, 1906 which enacted that `an action for tort against a trade union shall not be entertained by any Court' was held not to affect disposal of an action commenced before passing of the Act. Similarly Court of Appeal in **Beadling** v. **Goll** ((1929) 38 TLR 128 (CA)) held that the Gaming Act, 1922,

which had repealed a section of an earlier Gaming Act will not terminate a pending action even though it had enacted that 'no action for the recovery of money under the said section shall be entertained by any Court'.

8. Apex Court in **Manujendra** v. **Purnendu Prasad** (AIR 1967 SC 1419), **Mohd. Idris** v. **Sat Narain** (AIR 1966 SC 1499) and **R.Kapilnath** v. **Krishna** ((2003) 1 SCC 444) held that a new law bringing about a change in forum does not affect pending actions, unless a provision is made in it for change over of proceedings or there is some other clear indication that pending actions are affected. But, all depends on the language of the statute. Thus, if the new law which is enacted during the pendency of a suit in a Civil Court is worded in the form that `no Civil Court shall have jurisdiction to settle, decide or deal with' certain questions which are committed to the jurisdiction of Revenue Courts and the pending suit relates to these questions, the jurisdiction of the Civil Court would be ousted as held in **Inacio Martines** v. **Narayan Hari Nair** (AIR 1993 SC 1756). It was so held in view of the express bar in the section. In Maxwell on the Interpretation of Statutes, 12th Edn. (1969), it is stated as follows:

> "'Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it, `involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.' "

9. The Wakf Act, 1954 was repealed by Wakf Act, 1995. In the repealed Act, a similar provision was included as section 55C in the year 1984. But, that was not enforced and parties were redressing their grievances by filing civil suits. Section 6 of the General Clauses Act reads as follows:

> "Where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears the repeal shall not-
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
> (c) affect any right, privilege, obligation or liability acquired,

accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

This also shows that in the absence of express or implied bar pending actions are not affected.

10. We have also got other references in the Wakf Act itself to show that pending suits will continue. Section 6 of the Wakf Act deals with disputes regarding wakfs and Section 7(5) reads as follows:

"7. **Power of Tribunal to determine disputes regarding wakfs:-**

xx xx xx

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of Section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before

> such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."

Section 93 also provides that even compromise of suits or proceedings before the Tribunal cannot be made without the sanction of the Wakf Board. Section 93 reads as follows:

> "**93. Bar to compromise of suits by or against mutawallis.-** No suit or proceeding in any court by or against the mutawalli of a wakf relating to title to wakf property or the rights of the mutawalli shall be compromised without the sanction of the Board."

This also indicates that a suit will continue to lie if it is filed before the introduction of Section 85, otherwise provision for compromising a suit pending before the court was unnecessary. Hence, the Wakf Act itself indicates that pending suits at the time of introduction of Section 85 will continue, but, no suit can be filed thereafter even if cause of action arose earlier. After the introduction of the Act, Wakf Board shall necessarily be made a party to the pending suits also. We also note that in **Mohammed Ibrahim** v. **State of Kerala** (2002 (3) KLT 649) a learned Single Judge of this court held that pendency of civil dispute does not bar the

Board from passing appropriate orders regarding control and administration of wakfs. We agree with the above view as Wakf Act has to be administered as per the existing law. The apprehension of the plaintiff is that notwithstanding the interim orders in the civil suit, due to political pressure his application before the Wakf Board is likely to be rejected and further proceedings will be taken. Notwithstanding the pendency of the suit, Wakf Board is entitled to pass orders depending on the facts and circumstances of the case with due notice to affected parties. But, plaintiff is also free to withdraw his petition before the Wakf Board if he is advised so. In view of the pendency of the civil suit and interim orders already passed, if any order is passed adversely to the plaintiff, that shall be implemented only after two weeks of communication of the order to the plaintiff so that plaintiff can agitate the same before the Wakf Tribunal or other appropriate forum and try to seek appropriate interim orders. No further relief can be granted in W.P.(C)No.20780 of 2005.

11. With regard to the order of impleadment and application for amendment, that was challenged only on the ground that civil court has no jurisdiction to pass the order. Since we have held that in the pending suits civil

courts have jurisdiction to continue to adjudicate a suit, no relief can be granted at present on the basis of the grounds raised in W.P.(C)No.8745 of 2005.

Both writ petitions are disposed of accordingly.

**J.B.KOSHY**
**JUDGE**

**T.R.RAMACHANDRAN NAIR**
**JUDGE**

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